CASE NO. 82-5935

UNITED STATES SUPREME COURT

October Term, 1982

RONALD JACKSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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ON APPEAL FROM THE SUPREME COURT OF FLORIDA
RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

THE FLORIDA SUPREME COURT DID NOT ERR IN DENYING PETITIONER'S STATE PETITION FOR WRIT OF HABEAS CORPUS WHEREIN PETITIONER ASSERTED COUNSEL'S FAILURE TO RAISE AND ARGUE SPECIFIC ISSUES RESULTED IN PETITIONER BEING DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

A.

WHETHER THE DECISION OF THE FLORIDA SUPREME COURT UPHOLDING THE DEATH SENTENCE DESPITE THE ERRONEOUS RELIANCE BY THE SENTENCING COURT ON A NON-STATUTORY AGGRAVATING FACTOR IS IN DIRECT CONFLICT WITH DECISIONS OF THE FIFTH AND ELEVENTH CIRCUITS CONTRARY TO CONSTITUTIONAL PRINCIPLES DEMANDED IN STATE APPELLATE REVIEW IN CAPITAL CASES.

B.

WHETHER THE FLORIDA SUPREME COURT'S DENIAL OF PETITIONER'S HABEAS CORPUS PETITION DID CONDONE A VIOLATION OF LOCKETT v. OHIO, 438 U.S. 586 (1978) AND EDDINGS v. OKLAHOMA, __U.S.__ 102 S.Ct. 869 (1982).

C.

WHETHER THE JURY INSTRUCTION PLACING THE BURDEN OF PROOF ON THE CAPITAL DEFENDANT TO SHOW DEATH IS AN APPROPRIATE SENTENCE VIOLATES MULLONEY v. WILBUR, 421 U.S. 684 (1975) AND SANDSTROM v. MONTANA, 442 U.S. 510 (1979).

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PRELIMINARY STATEMENT

Respondents accept the portion of the Petition for Writ of Certiorari setting forth the citation to the inion Below, Constitutional Provisions and Statutes I. olved and Statements of the Case found on pages 1-5 of the Petition. With regard to the Question Presented and Jurisdiction, Respondents have rephrased the Question Presented and would contend Petitioner has failed to demonstrate grounds warranting this Court's jurisdiction.

REASONS FOR NOT GRANTING THE WRIT

Petitioner raises three grounds upon which he asserts relief should be granted. Respondents submit that each ground is not properly before the Court in that Petitioner's

state petition for writ of habeas corpus presented to the Florida Supreme Court challenged the competency of counsel for failing to raise the three issues presented herein. The Florida Supreme Court in reviewing each claim in light of whether Petitioner's counsel was competent, concluded that Petitioner's counsel did not fall below the Knight v. State, 394 So.2d 997 (Fla. 1981) standard and held that "no substantial deficiency" occurred on appeal "by which he was prejudicied." (P.Appendix A-p2.)

Moreover, Petitioner seek to have reviewed the merits of each claim albeit this Court in Jackson v. State, 444 U.S. 885 (1979) denied certiorari on the same issues when Petitioner sought review following the affirmance of his direct appeal by the Florida Supreme Court in Jackson v. State, So.2d 752 (Fla. 1978). Petitioner is attempting to obtain a second bite of this Court's apple.

THE FLORIDA SUPREME COURT DID NOT ERR IN DENYING PETITIONER'S STATE PETITION FOR WRIT OF HABEAS CORPUS WHEREIN PETITIONER ASSERTED COUNSEL'S FAILURE TO RAISE AND ARGUE SPECIFIC ISSUES RESULTED IN PETITIONER BEING DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

A. THE DECISION OF THE FLORIDA SUPREME COURT UPHOLDING THE DEATH SENTENCE DESPITE THE ERRONEOUS RELIANCE BY THE SENTENCING COURT ON A NON-STATUTORY AGGRAVATING FACTOR IS NOT IN DIRECT CONFLICT WITH DECISIONS OF THE FIFTH AND ELEVENTH CIRCUITS CONTRARY TO CONSTITUTIONAL PRINCIPLES DEMANDED IN STATE APPELLATE REVIEW IN CAPITAL CASES.

Petitioner has refashioned the issues by now contending that the Florida Supreme Court's decision denying state habeas corpus relief directly conflicts with Zant v. Stephens, cert granted, __U.S.__, 102 S.Ct. 90 (1981) certified to Georgia Supreme Court __U.S.__, 102 S.Ct. 1856 (1982) and Henry v. Wainwright, 686 F.2d 311

(5th Cir. 1982) cert pending; Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982) cert pending.

In denying Petitioner habeas corpus relief, the Court reviewed the alleged omissions in terms of whether said omissions resulted in a denial of effective assistance of counsel. The Court observed:

> "In giving the reasons for the death sentence in this case, the trial judge was assuring himself that he was reaching a similar result to that reached under similar circumstances in another case. This reasoning process is exemplified by the cite to Sullivan. It was after this that the Court said:
>
> > This Court has observed the demeanor and the action of the defendant throughout this entire trial and has not observed any sign of remorse, indicating full well to this Court that the death penalty is the proper selection of the punishment to be imposed in this particular case. 366 So.2d at 756-757.
>
> This was error. However, the defendant has the burden to show that this specific deficiency when considered under the circumstances of the individual case was substantial enough to demonstrate a prejudice to him to the extent that there is a likelihood that the deficient conduct affected the outcome of the proceedings. This means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error. Knight v. State." P. Appendix A - p.4

The Court after reviewing the nature of the issue involved held:

> "It is beyond reason to conclude that the trial judge's decision to impose the death penalty would have been affected by the elimination of the unauthorized aggravating circumstance. Brown v. State, 381 So.2d 690 (Fla. 1980), cert den. 449 U.S. 1118 (1981). There was no substantial deficiency by appellate counsel and no prejudice stemming from the failure to raise this issue." P. Appendix A - p.4-5.

This Court in Jackson v. State, supra, denied certiorari in 1979 on the theory that use of a non-statutory aggravating circumstance did not present a

compelling issue. Similarly in Brown v. State, 381 So.2d 690 (Fla. 1980) this Court again in reviewing a similar claim denied certiorari. Recently, the State of Florida agreed in Barclay v. Florida, Case No. 81-6908 that a federal question was raised therein concerning whether the use of a non-statutory aggravating circumstance required vacation of the death sentence and a new sentencing hearing.

Respondents would submit that sub judice Petitioner is attempting to gain review by back-dooring an alleged Barclay issue, when in fact the Florida Supreme Court found in Jackson v. Wainwright, __So.2d__ (Fla. 1982) Case No. 60,271 decided October 13, 1982, that error occurred but that counsel's representation and his failure or omission to raise this claim did not result in ineffective assistance of counsel

The authorities Petitioner argues conflict with the Florida Supreme Court's decision are either distinguishable or non-final decisions pending review before this Court. More importantly a review of the decision in Jackson v. Wainwright, supra, reveals that the Court did not reach its result that said error denied Petitioner competent counsel on speculation, but rather reasoned judgment based on its function as announced in Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981) to determine whether the evidence supports the trial court's imposition of death and to insure procedural regularity in the application of Florida's death penalty.

B. THE FLORIDA SUPREME COURT'S DENIAL OF PETITIONER'S HABEAS CORPUS PETITION DID NOT CONDONE A VIOLATION OF LOCKETT v. OHIO, 438 U.S. 586 (1978) AND EDDINGS v. OKLAHOMA, __U.S.__ 102 S.Ct. 869 (1982).

The Florida Supreme Court concluded that Petitioner's counsel did not render ineffective assistance

in not raising this claim on direct appeal. Specifically the Court observed:

> "It is apparent from the Court's order that the trial judge did in fact consider these mitigating circumstances and further, that he weighed the evidence on this issue and resolved the factual conflicts in favor of the state. The record does not support defendant's contention, so the failure of appellate counsel to raise this issue is not an omission that was a serious deficiency. There was no prejudice shown." P. Appendix A - p.5.

Where, as here, the trial court in considering the tendered evidence of "mitigation" gave said evidence little or no weight, no Lockett v. Ohio, 438 U.S. 586 (1970) has occurred. This same issue was rejected by this Court in denying certiorari review in Jackson v. State, supra. Moreover, the Florida Supreme Court has held in a number of decisions similar to Lucas v. State, 376 So.2d 1149, 1153 (Fla. 1979) that the Supreme Court will not substitute its judgment for that of the trier of fact and thus concluded that resolution of conflicting evidence on mental condidtion "lies within the province of the trier of fact" whose duty it is to "weigh the evidence presented."

C. THAT THE JURY INSTRUCTION PLACING THE BURDEN OF PROOF ON THE CAPITAL DEFENDANT TO SHOW DEATH IS NOT AN APPROPRIATE SENTENCE VIOLATES MULLONEY v. WILBUR, 421 U.S. 684 (1975) AND SANDSTROM v. MONTANA, 442 U.S. 510 (1979).

The claim asserted challenges the propriety of the trial court's instruction to the jury that if the jury found statutory aggravating factors to exist, "death is presumed to be the proper sentence unless it or they are overridden by on or more of the mitigating circumstances provided."

The Florida Supreme Court in concluding appellate counsel was not ineffective for failing to raise said claim concluded that the instruction was not improper and therefore counsel did not render ineffective assistance.

A similar claim has been rejected by a number of federal district courts reviewing capital cases that there has not been an impermissible shift of burden.

In Dixon v. State, 283 So.2d 1 (Fla. 1973) cert den. 416 U.S. 943 (1974), the Court held that while all evidence of mitigation may be considered, aggravating circumstances must be proved beyond a reasonable doubt before being considered by the jury or judge. In Florida, the death penalty is appropriate only where there exist evidence of one or more aggravating circumstances beyond a reasonable doubt. Mitigating cricumstances are not presented as rebuttal but rather in an effort to show whether the totality of the circumstances warrants less than the death penalty. Clearly there is no improper shifting of burden.

Neither does a mere counting of aggravating and mitigating circumstances occur. Rather reasoned judgment must be construed as an admonishment to the jury that they are not to add up the aggravating and mitigating circumstances but rather they are to weigh the totality of circumstances in reaching a reasoned judgment.

Petitioner has failed to satisfactorily demonstrate that the Florida Supreme Court in viewing whether appellate counsel was competent misapplied the law or incorrectly concluded that said omissions were error of such proportion that prejudice resulted and Petitioner's sentence of death was flawed.

CONCLUSION

Based on the foregoing, Respondents would urge this Court to deny exercising its jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by mail to KAREN M. GOTTLIEB, BENNETT H. BRUMMER, and ELLIOT H. SCHERKER, Public Defender's Office, 1351 N.W. 12th Street, Miami, Florida 33125, this 14th day of March, 1983.

_____
CAROLYN M. SNURKOWSKI
Assistant Attorney General

bc/